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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TRAVON PUGH, Defendant and Appellant.	B199004 (Los Angeles County Super. Ct. No. TA080431)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur M. Lew, Judge. Modified and, as modified, affirmed with directions.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

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Travon Pugh appeals from the judgment entered following his convictions by jury on two counts of attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664, 187; counts 1 & 2) with findings as to each offense that he personally and intentionally discharged a firearm (Pen. Code, § 12022.53, subd. (c)), personally and intentionally discharged a firearm causing great bodily injury or death (Pen. Code, § 12022.53, subd. (d)), and committed the offense for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)) and on count 3 – shooting at an occupied motor vehicle (Pen. Code, § 246) with findings that he personally and intentionally discharged a firearm causing great bodily injury or death (Pen. Code, § 12022.53, subd. (d)) and committed the offense for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)), and with court findings that he suffered two prior felony convictions (Pen. Code, § 667, subd. (d)), two prior serious felony convictions (Pen. Code, § 667, subd. (a)), and three prior felony convictions for which he served separate prison terms (Pen. Code, § 667.5, subd. (b)). The court sentenced him to prison for 80 years to life with the possibility of parole. We modify the judgment and, as modified, affirm it with directions.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that in May 2005, Sylvester Harris and his girlfriend, Shante Henderson, lived on Cedar in a residential community in Compton. They lived in an area claimed by the Tree Top Piru gang. Harris was a former member of a rival gang. On May 25, 2005, Henderson fought a female at the Compton train station. Appellant, a Fruit Town Piru gang member, was the female's boyfriend. He joined the fight and assaulted Henderson. Harris then fought appellant, who was 6'2" tall.

1. *Harris's Testimony.*

About 1:00 p.m. on June 6, 2005, Harris drove a Plymouth Voyager van to the Cedar residence. Harris testified the van contained Henderson and L.H. L.H., about one year old, was the daughter of Harris and Henderson. Henderson was in the front

passenger seat and L.H. was in a car seat in the back. Upon arrival, Harris parked the van on the street. Henderson went into the residence to get something.

On direct examination, Harris testified he "took [the baby] out of the car seat and laid her on the front seat in the baby seat." Harris later testified he brought his baby up to the front seat.[1]

Harris saw an oncoming car speeding towards the van. The car was an older model Buick Regal or Oldsmobile Cutlass. The car was angling a little toward the van and drove towards the driver's side of the van. The van and car were about eight to ten feet apart when Harris first recognized that the driver of the car was appellant. At some point Harris saw a second male in the car. The second male was seated in the car's front passenger seat.

The car pulled up to the driver's side of the van and stopped. The car and van were facing opposite directions so the driver's window of the car was next to the driver's window of the van. Once the car stopped, appellant began shooting a Glock semi-automatic handgun. At the time, appellant was about six to eight feet from Harris, who was seated in the driver's seat of the van. Appellant fired about 12 or 13 shots.

Harris was looking at appellant when appellant fired the first shot. Harris got down when appellant fired the second shot. Harris ducked, a bullet grazed his arm, and he leaned towards his right. When he did this, he grabbed L.H. and appellant shot Harris in the back. Harris had been unable to walk since that time. The prosecutor commented the baby was in the passenger's seat, then asked if the passenger's seat was an arm's length from Harris. Harris replied yes. Henderson ran out to the van and took L.H. out of it.

People's exhibit No. 13 was a photograph depicting the driver's side of the van after the shooting. The photograph depicted bullet holes on the door frame, by the door handle, above the door handle, and behind the second panel on the van. The photograph,

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[1] During cross-examination of Harris, the following occurred: "Q You said that you took [L.H.] out of the baby seat, and you laid her down on the front seat; is that right? [¶] A Yes."

which this court has reviewed, also shows what appears to be shattered glass on the front passenger side windowsill, armrest, and seat.

During cross-examination, Harris testified he took L.H. out of the baby seat, and laid her on the front seat. L.H. was asleep. A couple of minutes passed from the time Harris pulled up to the house on Cedar to the time he first saw the car appellant was driving. The shooting occurred immediately when the car pulled alongside the van, and the shots were rapid. Probably 15 seconds passed from the time the car pulled up to the time Harris heard it drive away.

When Harris was in the van, he was sitting a little higher than he would have been sitting if he had been in a regular car. According to Harris, a Buick or Cutlass "[sat] down lower" than the van. When Harris was seated in the driver's seat of the van, he was looking down at appellant. Harris indicated he could see appellant from appellant's head to a little below appellant's chest. Appellant could not look down and see Harris's body. The following occurred during appellant's cross-examination of Harris: "Q By [Appellant's Counsel]: You don't think [appellant] could have seen your body . . . ? [¶] A . . . what I seen on him, he seen on me."

2. *Henderson's Testimony.*

Henderson testified as follows. Appellant parked the van about a couple of feet behind a car, close enough so a person would have to squeeze between the two parked vehicles. The parked car in front of the van was not a "high car like an SUV" but was a wagon which Henderson described as low. Before Henderson went into the house, she placed L.H. on the front seat of the van. The prosecutor asked whether Harris, or Henderson, was the person who placed L.H. on the front seat. Henderson replied, "I think I did, if I'm not mistaken." Henderson was not certain on the issue.

Henderson was inside the house for five minutes or less. She then came outside and, while standing on the porch, saw a black Cutlass or Regal to her right, coming down the street towards the van and facing the opposite way the van was facing. The van was parked to the left of Henderson.

As the Cutlass was coming closer to the van, Henderson saw that appellant was driving the Cutlass. She was trying to hurry to the van. According to Henderson, the Cutlass started shooting and, by that time, she was already running to the van. Once she arrived, she opened the van's passenger door and ducked.

Henderson also testified that when the Cutlass was pulling up close to the van, Henderson saw appellant pull out a gun and start shooting. She testified she saw appellant's "arm out the window shooting" a black handgun. Appellant fired the gun probably eight or nine times.

The prosecutor asked Henderson whether, when she was coming out the house, she could look between the van and the car parked in front of the van, and see the Cutlass pull alongside the van while appellant was shooting. Henderson indicated she could not see the entire Cutlass but could see "through the windows." Henderson did not remove L.H. from the van until after the Cutlass had left.

During cross-examination, Henderson denied telling police that the driver of the vehicle pulled out a handgun and started shooting in her direction. She testified that when appellant began shooting, he was shooting at the van. She also testified that she "said that [appellant] was shooting at me, my baby and boyfriend." She also wrote down, "It's the same person who shot at me, my baby and shot my boyfriend."

3. *Deputy Garcia's Testimony.*

About 1:20 p.m. on June 6, 2005, Los Angeles County Sheriff's Deputy Roberto Garcia and his partner received a call that a person had been shot. Garcia went to the Cedar address and saw a man hunched over in the driver's side of a Plymouth vehicle which was like a minivan. There were numerous places on the driver's side of the van where bullets had caused damage.

Henderson told Garcia, and Garcia wrote in his report, that Henderson "was standing on the passenger's side of the vehicle when she saw a black Buick Regal with two male Blacks drive up and stop." She also said "the driver of the vehicle pulled out a handgun and started shooting in her direction." Henderson told Garcia that Henderson was already standing by the van when the car approached and stopped. The above

statements by Henderson were Garcia's summaries of what Henderson said, not her exact words. Garcia saw seven .40-caliber expended shell casings and two bullet rounds at the scene. A .40-caliber bullet was a type of bullet fired by Glock handguns.

4. *Detective Gonzalez's Testimony.*

Los Angeles County Sheriff's Detective Jose Gonzalez investigated the shooting and observed the victim's vehicle, a Plymouth Voyager. A photograph (People's exhibit No. 14) depicted the Plymouth's front windshield, the steering wheel, and a bullet hole in the front windshield. A photograph (People's exhibit No. 20) depicted several bullet holes in the Plymouth van's "door, the support beam on the door, and . . . one on the . . . left rear quarter panel."

On June 24, 2005, Gonzalez showed Henderson a photographic identification folder containing six photographs. During cross-examination, Gonzalez indicated that Henderson wrote on the admonition form that appellant "shot at her, and then had also shot at the baby, and in fact had shot Mr. Harris[.]" Gonzalez, apparently looking at the admonition form, testified Henderson identified appellant and wrote on the form, "The person who shot at me, my baby, and shot my boyfriend."

Gonzalez testified a photograph showed "essentially a range of bullet holes from the very front windshield across the driver's door into the passenger side door and then stopping at that point[.]"[2] A detective and gang expert testified the offense was committed for the benefit of a criminal street gang. Appellant presented no defense evidence.

CONTENTIONS

Appellant claims (1) there is insufficient evidence to support the finding as to count 2 that the attempted murder of L.H. was willful, deliberate, and premeditated, and

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2 Gonzalez earlier had testified that he was not certain, but he believed 10 or 11 casings had been recovered from the scene. Gonzalez, his memory later refreshed by his report, testified that seven shell casings and two bullet rounds were recovered from the street.

(2) the trial court erred by failing to define for the jury the term "zone of risk" in CALJIC No. 8.66.1. Respondent claims additional court security fees must be imposed.

DISCUSSION

1. *There Was Sufficient Evidence as to Count 2 that Appellant Committed Attempted Willful, Deliberate, and Premeditated Murder.*

Appellant claims there is insufficient evidence to support the finding as to count 2 that the attempted murder of L.H. was willful, deliberate, and premeditated. We disagree.

Although appellant explicitly challenges the sufficiency of the evidence supporting the willful, deliberate, and premeditated finding as to count 2,[3] his argument that he did not know L.H. was in the van challenges the sufficiency of the evidence supporting his conviction on that count as well. We address both issues below.

a. *There Was Sufficient Evidence that Appellant Attempted to Murder L.H.*

(1) *Applicable Law.*

An attempt to commit a crime consists of a specific intent to commit the crime, and a direct but ineffectual act done towards its commission, i.e., an overt ineffectual act which is beyond mere preparation yet short of actual commission of the crime. (*People v. Toledo* (2001) 26 Cal.4th 221, 229.) Attempted murder requires specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*).)

It "is well settled that intent to kill or express malice, the mental state required to convict a defendant of attempted murder, may in many cases be inferred from the defendant's acts and the circumstances of the crime. [Citation.] 'There is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the

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3 For example, appellant argues, "Appellant claims that the evidence is insufficient to support the jury's finding that he committed the crime charged in count 2 'willfully, deliberately, and with premeditation within the meaning of Penal Code section 664(a)' . . . because there was no evidence that appellant was even aware of [L.H.'s] presence in the van at the time of the shooting, from which the jury could infer that he acted with the requisite state of mind."

circumstances of the attempt, including the defendant's actions. [Citation.] The act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ." [Citation].)' [Citations.]" (*Smith, supra,* 37 Cal.4th at p. 741.)

"[T]he act of purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted with express malice. That the shooter had no particular motive for shooting the victim is not dispositive, . . . Nor is the circumstance that the bullet misses its mark or fails to prove lethal dispositive—the very act of firing a weapon '"in a manner that could have inflicted a mortal wound had the bullet been on target"' is sufficient to support an inference of intent to kill. [Citation.] Where attempted murder is the charged crime because the victim has survived the shooting, this principle takes on added significance. Finally, even if the shooting was not premeditated, with the shooter merely perceiving the victim as 'a momentary obstacle or annoyance,' the shooter's purposeful 'use of a lethal weapon with lethal force' against the victim, if otherwise legally unexcused, will itself give rise to an inference of intent to kill. [Citation.]" (*Smith, supra,* 37 Cal.4th at p. 742.)

(2) *There Was Sufficient Evidence Appellant Knew L.H. Was in the Van and Attempted to Murder Her.*

In the present case, there was substantial evidence that appellant fired toward Harris and L.H. at a close range and in a manner that could have inflicted a mortal wound had the bullets been on target. There is no dispute appellant attempted to murder Harris. Assuming appellant knew L.H. was in the van's front passenger seat, we conclude the fact that he fired toward her at a close range and in a manner that could have inflicted a mortal wound had the bullets been on target was sufficient evidence that appellant attempted to murder L.H. (Cf. *Smith, supra,* 37 Cal.4th at pp. 741-742.)

Of course, appellant argues he did not know L.H. was in the van. In *Smith,* another case involving a conviction for the attempted murder of a baby, the court stated, "Intent to unlawfully kill and express malice are, in essence, 'one and the same.'

[Citation.] To be guilty of attempted murder of the baby, defendant had to harbor express malice toward that victim. [Citation.] Express malice requires a showing that the assailant '"'either desire[s] the result [i.e., death] or know[s], to a substantial certainty, that the result will occur.' [Citation.]"'" [Citations.]" (*Smith, supra,* 37 Cal.4th at pp. 739.) Appellant is essentially arguing he did not know L.H. was in the van, therefore, he did not know to a substantial certainty that her death would occur and, as a result, he lacked intent to kill her.

The issue, therefore, is whether there was sufficient evidence that appellant knew L.H. was in the van. In this sufficiency determination, "Our power as an appellate court begins and ends with the determination whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, to support the judgment. [Citation.]" (*People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1181-1182.)

Harris testified, "I took [L.H.] out of the car seat and laid her on the front seat *in the baby seat*." (Italics added.) Harris used the phrases "car seat" and "baby seat" interchangeably (see fn. 1). The jury reasonably could have concluded that after Henderson left the car, Harris took L.H. out of the baby seat in the back seat, put the baby seat in the front passenger seat, and put L.H. in the baby seat. If so, L.H. was in the front passenger seat and in an elevated position. The car appellant was driving (hereafter, the Cutlass) and the van were generally facing towards each other when the Cutlass was approaching the van. As the Cutlass was approaching the van, and even before the Cutlass was next to the van, Harris could see two persons in the Cutlass.

The jury reasonably could have concluded that when the Cutlass was initially approaching the van, the parties would have been able to see each other through their respective front windshields. The van was parked closely behind a vehicle, but Henderson described that vehicle as a low wagon. Moreover, Henderson's testimony permits the inference that when she was coming out of her house, she could see, "through the windows" of the low wagon, the Cutlass next to the van. The jury reasonably could have concluded that if she could see through the wagon's windows, the parties could see each other through them as the Cutlass approached the van.

The jury also reasonably could have concluded that if Harris, and the two persons in the Cutlass, were generally seated at a level such that Harris could see the two persons in the Cutlass, appellant could see the two persons in the front of the van, that is, Harris and L.H. One of the shots entered the front windshield; the jury reasonably could have concluded that when appellant fired that shot, appellant was able to see Harris and L.H. through the front windshield

When appellant drove next to the van and stopped, the drivers' doors of the Cutlass and van, respectively, were about six to eight feet apart. Although appellant, in the Cutlass, was seated, we note he was 6'2" tall. The Plymouth Voyager containing Harris and L.H. was a minivan, indicative of its reduced size.

Harris testified he could see appellant from appellant's head to a little below appellant's chest. Harris was looking down at appellant but, significantly, Harris also testified, "what I seen on [appellant], he seen on me." The jury reasonably could have concluded from this that the scope of what Harris could see in the Cutlass was generally similar to the scope of what appellant could see in the van and, therefore, that appellant would have been able to see L.H. in her elevated position in the baby seat not only when the Cutlass was approaching the van but when the vehicles were alongside each other.

Harris testified appellant fired two shots, and Harris got low and ducked. Harris did not testify that L.H. similarly lowered her position. When Harris ducked, appellant fired another shot and the bullet grazed Harris's arm. Harris leaned towards the right (towards, therefore, L.H.), and the passenger's seat was about an arm's length away. Harris grabbed L.H., appellant shot him in the back, and appellant *continued* firing.

Importantly, Henderson, an eyewitness to the shooting who was able to see the van and appellant's vehicle, testified she earlier had said that appellant was "shooting *at* me, *my baby and* boyfriend." (Italics added.) She wrote this on the photographic admonition form; Gonzalez testified Henderson wrote that appellant "shot at her, *and then had also shot at the baby*" *and* shot Harris. (Italics added.) Henderson identified appellant to a detective as the person who "shot *at* me, *my baby and* shot my boyfriend." (Italics added.) Henderson thus expressly distinguished appellant shooting at L.H. and

appellant shooting at Harris. Appellant points to no evidence compelling the conclusion he could not have seen L.H. in the van. We conclude there was sufficient evidence that appellant knew L.H. was in the van's front passenger seat, and that he attempted to murder her.

(3) *There Was Sufficient Evidence Appellant Attempted to Murder L.H. Even If He Did Not Know She Was in the Van.*

In *People v. Vang* (2001) 87 Cal.App.4th 554 (*Vang*), a case in which two codefendants were convicted, inter alia, on multiple counts of attempted murder, the facts, as pertinent to the present case, were as follows. A car pulled up to a duplex and Mr. Chang Her, inside a unit, opened the unit's door to look outside. As Her stood with his daughter at the open doorway, the codefendants, in the car, immediately sprayed bullets at the duplex. A majority of the bullets struck Her's unit, causing extensive interior damage. (*Vang*, at pp. 557-558.) *Vang* observed, "Twenty-one shell casings from an AK series assault rifle and five shotgun shells were found at the scene. At least 50 bullet holes dotted the front of the duplex, with the majority focused on Chang Her's unit. 'In fact, there was so much gunfire damage, it was hard to follow each and every hole.' The damage spanned a distance of 25 feet, ranging from three inches to six and one-half feet above ground. There was also extensive gunfire damage throughout each unit's interior." (*Id.* at p. 558.)

A few minutes later and a few blocks away, the codefendants were seen backing up towards a car and spraying bullets at an apartment in which Touhar Fang could be seen. The codefendants then entered the car, which drove away. The bullets caused extensive interior damage to the apartment. (*Vang, supra*, 87 Cal.App.4th at p. 558.)

A jury convicted the codefendants not only of the attempted murder of Chang Her (count 4), but of the attempted murders of two children inside his duplex unit, i.e., Kalia Her and Andy Her (counts 3 & 5, respectively). Similarly, the jury convicted the codefendants not only of the attempted murder of Touhar Fang (count 7), but of the attempted murders of two children who were watching television in a bedroom, i.e.,

Louise Fang and Yee Fang (counts 8 & 9, respectively). (*Vang, supra,* 87 Cal.App.4th at pp. 556, 557, 563.) There were additional victims at each location.

In *Vang*, the appellate court stated, "We conclude that spraying an occupied residence with bullets from high-powered assault rifles manifests a deliberate intention to unlawfully take the lives of its inhabitants." (*Vang, supra,* 84 Cal.App.4th at p. 556.)

More specifically, *Vang* later stated, "Defendants Yang and Vang argue the evidence is deficient because it fails to prove that the perpetrators intended to kill any inhabitant other than Chang Her and Touhar Fang. This is due to the location of bullets centered around the area where Her and Fang could be seen from the street. They argue this indicates a specific intent to kill them but not anyone else. Defendants acknowledge bullets hit each residence, but argue this was due to the movement of the car during the Her shooting, and because of movement by the shooters at the Fang apartment. We disagree." (*Vang, supra,* 84 Cal.App.4th at p. 563.)

Vang continued, "The jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that defendants harbored a specific intent to kill every living being within the residences they shot up. (See, e.g., *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1463-1464; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1436-1437.)" (*Vang, supra,* 84 Cal.App.4th at pp. 563-564.)

"Defendants' argument might have more force if only a single shot had been fired in the direction of where Chang Her and Touhar Fang could be seen. [Fn. omitted.] In light of the facts summarized earlier, the inferences defendants would have this court draw are unreasonable and were properly rejected by the jury. Stated briefly, section 188 provides that malice aforethought 'is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.' In this case, defendants manifested a deliberate intention to unlawfully take the lives of others when they fired high-powered, wall-piercing, firearms at inhabited dwellings. The fact they could not see all of their victims did not somehow negate their express malice or intent to kill as to

those victims who were present and in harm's way, but fortuitously were not killed." (*Vang, supra,* 84 Cal.App.4th at p. 564.)

In *Vang*, there was substantial evidence that, prior to the shootings at Her's duplex unit and later at the nearby apartment, each residence was occupied, i.e., there was at least one person inside each residence. Just prior to the shooting at the duplex, Chang Her opened the door to his unit and stood in the open doorway with his daughter. Just prior to the shooting at the apartment, Touhar Fang could be seen inside.

However, the codefendants "could not see *all* of their victims." (*Vang, supra,* 84 Cal.App.4th at p. 564, italics added.) *Vang* did not discuss whether the codefendants saw any of the four victims (Kalia Her, Andy Her, Louise Fang, or Yee Fang), whether any of the four could be seen, or whether the codefendants knew that any of the four victims were inside their respective residences. In any event, *Vang* rejected the codefendants' sufficiency challenges to, inter alia, the attempted murder convictions as to these four victims as against the codefendants' claim that they could not see them. (*Vang, supra,* 87 Cal.App.4th at p. 565.)

In *People v. Bland* (2003) 28 Cal.4th 313 (*Bland*), our Supreme Court stated, "California cases that have affirmed convictions requiring the intent to kill persons other than the primary target can be considered 'kill zone' cases even though they do not employ that term." (*Bland,* at p. 330.) *Bland* cited *Vang* as an example. (*Bland,* at p. 330.) *Vang* therefore suggests that when a defendant sprays high-powered, wall-piercing ammunition into a residence which the defendant knows is occupied by at least one person, and the primary target whom the defendant intends to kill is an occupant, the defendant may be convicted of the attempted murder of other nontargeted occupants on the kill zone theory that the defendant intended to kill everyone in the residence, even if the defendant did not know the nontargeted occupants were inside.

In *People v. Adams* (2008) 169 Cal.App.4th 1009 (*Adams*), the facts, as pertinent to the instant case, were as follows. A defendant committed arson of a residence and the resulting fire killed an occupant. Three persons fled from inside the burning residence. A jury convicted the defendant of murder and convicted him on three counts of attempted

premeditated murder. (*Id.* at pp. 1012-1014.) The defendant, effectively mounting a sufficiency challenge, contended "her convictions for attempted premeditated murders of [the] three . . . people who were at the site of the arson fire should be vacated because she did not know that they were present." (*Id.* at p. 1012.)

Adams stated, "In *Smith,* the California Supreme Court held that multiple attempted murder convictions could be supported by evidence that the defendant fired a single bullet at two victims even without using a concurrent intent theory. (*Smith, supra,* 37 Cal.4th at p. 746.) In *Bland,* the Supreme Court concluded that multiple attempted murder convictions could be supported under a concurrent intent theory by evidence that the defendant used means that created a zone of harm or a kill zone, such as a hail of bullets or an explosive device. (*Bland, supra,* 28 Cal.4th at pp. 329-330.)" (*Adams, supra,* 169 Cal.App.4th at p. 1022.)

Adams later stated, "Where it may be concluded that a defendant has knowledge of the presence of other victims, coupled with the specific intent to kill, that has generally been sufficient to support a reasonable inference that the defendant intended to kill the attempted murder victims. Thus, in *Smith,* the California Supreme Court noted that 'where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the "kill zone") as the means of accomplishing the killing of that victim,' 'a rational jury could conclude beyond a reasonable doubt that the shooter intended to kill not only his targeted victim, but also *all others he knew were in the zone of fatal harm*.' (*Smith, supra,* 37 Cal.4th at p. 746, italics added.)" (*Adams, supra,* 169 Cal.App.4th at p. 1022.)

Adams continued, "However, we do not agree with Adams's argument that the California Supreme Court's observations on the kill zone theory in *Smith* implies that knowledge of the presence of the alleged murder victims is required before a defendant can be convicted of attempted murder of those persons. [¶] First, the observations were mere dicta as the *Smith* Court concluded that the attempted murder convictions in that case could be sustained without reference to the kill zone theory. (See *Smith, supra,* 37 Cal.4th at p. 746.)" (*Adams, supra,* 169 Cal.App.4th at p. 1022.)

Adams then stated, "Second, the fact that a rational jury could conclude that a defendant who knows of the presence of the victims, which was the factual scenario in *Smith*, had the necessary express malice does not preclude a rational jury from concluding that a defendant who does not know of the presence of the victims also had the necessary express malice if the jury found that the defendant intentionally created a zone of harm and that the victims were in that zone of harm." (*Adams, supra,* 169 Cal.App.4th at pp. 1022-1023.)

Adams continued, "Rather, the concurrent intent doctrine permits a rational jury to infer the required express malice from the facts that (1) the defendant targeted a primary victim by intentionally creating a zone of harm, and (2) the attempted murder victims were within that zone of harm. The concurrent intent theory recognizes that the defendant acted with the *specific intent to kill anyone* in the zone of harm with the objective of killing a specific person or persons. The theory imposes attempted murder liability where the defendant intentionally created a kill zone in order to ensure the defendant's primary objective of killing a specific person or persons despite the recognition, or with acceptance of the fact, that a natural and probable consequence of that act would be that anyone within that zone could or would die." (*Adams, supra,* 169 Cal.App.4th at pp. 1023, italics added.)

Adams concluded, "Whether or not the defendant is aware that the attempted murder victims were within the zone of harm is not a defense, as long as the victims actually were within the zone of harm. (See, e.g., *People v. Vang,* (2001) 87 Cal.App.4th 554, 563-565 [evidence was sufficient to support attempted murder convictions of inhabitants of residences even though defendants could not see all of their victims because defendants sprayed wall-piercing bullets at residences].)" (*Adams, supra,* 169 Cal.App.4th at p. 1023.)

Adams then said, "From the evidence, a rational jury could infer that Adams had the necessary express malice for attempted murder because: (1) Adams had the express intent to kill [the decedent] by intentionally creating a zone of harm or kill zone, in that Adams set fires at both the front and back of the house, and (2) that [the three surviving

victims] were within that zone of harm. Thus, we reject Adams's argument that her attempted murder convictions should be vacated because she was not aware of the presence of persons other than [the decedent] at the house." (*Adams, supra,* 169 Cal.App.4th at p. 1023.)

In *Adams,* like *Vang*, there was substantial evidence that, prior to the killing (in *Adams,* by arson) the defendant knew the residence was occupied, i.e., that at least one person was inside. There was substantial evidence the defendant knew the decedent was inside. (*Adams, supra,* 169 Cal.App.4th at pp. 1014-1017, 1020, 1023.)

Adams therefore stands for the proposition that when a defendant sets fire to a residence which the defendant knows is occupied by at least one person, and the primary target whom the defendant intends to kill is an occupant, the defendant may be convicted of the attempted murder of other nontargeted occupants on the kill zone theory that the defendant intended to kill everyone inside the residence, even if the defendant did not know the nontargeted occupants were inside.

In *Vang* and *Adams*, the unknown attempted murder victims were inside residences and not inside a van. However, we do not find this controlling. There was substantial evidence the van in this case was occupied, i.e., Harris was seated in the driver's seat of the van. Appellant does not dispute the sufficiency of the evidence that he shot at an occupied motor vehicle (count 3). The jury reasonably could have concluded appellant knew the van was occupied by at least one person—Harris. There was substantial evidence that appellant, from a stationary position on the driver's side of the van, sprayed the passenger compartment of the van with 12 to 13 lethal, high-caliber bullets which penetrated into the van.

We conclude that where, as here, a defendant sprays multiple, high-caliber, vehicle door-piercing ammunition into the passenger compartment of a van which the defendant knows is occupied by at least one person (here, Harris), and the primary target whom the defendant intends to kill is an occupant (again, Harris), the defendant may be convicted of the attempted murder of other nontargeted occupants (e.g., L.H.) on the kill

zone theory that the defendant *intended to kill everyone* inside the van, even if the defendant did not know the nontargeted occupants were inside.

We also conclude that where, as here, appellant sprayed ammunition as indicated above into the passenger compartment of a van which he knew was occupied by Harris, this provided substantial evidence that appellant purposed or desired to kill anyone and everyone inside the occupied van, including L.H., and whether or not appellant knew L.H. was inside or, therefore, knew to a substantial certainty that she would be killed. Accordingly, appellant intended to kill, and attempted to murder, L.H.

b. *There Was Sufficient Evidence that the Attempted Murder of L.H. Was Willful, Deliberate, and Premeditated.*

(1) *Applicable Law.*

For purposes of willful, deliberate, and premeditated attempted murder, "[w]illful" means intentional; "deliberate" means arrived at as a result of careful thought and weighing of considerations for and against; and "premeditated" means considered beforehand. (*People v. Perez* (1992) 2 Cal.4th 1117, 1123.)

"An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse. [Citations.] However, the requisite reflection need not span a specific or extended period of time." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) "[P]remeditation can occur in a brief period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' [Citations.]" (*People v. Perez, supra,* 2 Cal.4th at p. 1127.) Premeditation and deliberation can thus occur in rapid succession. (*People v. Bloyd* (1987) 43 Cal. 3d 333, 348 (*Bloyd*).

The act of obtaining a weapon is evidence of planning consistent with a finding of premeditation and deliberation. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1081-1082.) The method of killing alone "can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder." (*People v. Memro* (1995) 11 Cal.4th 786, 863-864.) An execution-style shooting at close range may also establish premeditation and deliberation. (*People v. Vorise* (1999) 72 Cal.App.4th 312, 318-319; *People v. Bolin* (1998) 18 Cal.4th 297, 332-333; *People v. Martinez* (2003) 113 Cal.App.4th 400, 412-413; *Bloyd, supra,* 43 Cal.3d at p. 348; *People v. Hawkins* (1995) 10 Cal.4th 920, 955-957.)

The assailant's use of a firearm against a defenseless person may show sufficient deliberation. (*Bolin, supra,* 18 Cal.4th at pp. 332-333.) Similarly, firing at vital body parts shows preconceived deliberation. (*Ibid*; *People v. Thomas* (1992) 2 Cal.4th 489, 517-518.)

(2) *Application of the Law to the Facts.*

There is no dispute that appellant attempted to murder Harris (count 1) and that the attempted murder of Harris was willful, deliberate, and premeditated. The jury's conclusion that the attempted murder of Harris was willful, deliberate, and premeditated was supported by planning activity (e.g., appellant's weapon possession), appellant's motive (e.g., his previous apparently gang-related fight with Harris), and appellant's manner of attempting to kill Harris. Such evidence of planning activity, appellant's motive, and the manner of attempting to kill L.H. provided substantial evidence that appellant's attempted murder of L.H. was willful, deliberate, and premeditated as well.

2. *The Trial Court Did Not Erroneously Fail to Define the Phrase "Zone of Risk."*

a. *Pertinent Facts.*

The court gave to the jury a modified CALJIC No. 8.66.1 instruction. The modified instruction read: "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by

killing everyone in that victim's vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a [zone of risk] is an issue to be decided by you." (Italics added.)

After jury deliberations commenced, the jury, at 2:25 p.m. on October 26, 2006, sent a note to the court. The note stated, "Requesting clarification on count #2, specifically the 'zone of risk' premise/language."

The October 26, 2006 minute order reflects as follows. The clerk contacted both counsel and informed them about the above note, and the court and counsel conferred on the issue. The court indicated to both counsel the court's proposed answer to the jury's inquiry. At 3:00 p.m., the answer was given to the jury. The court gave its answer by replying in writing on the jury's note, "The 'zone of risk' is defined in 8.66.1. The definition cannot be made clearer than what is in 8.66.1." The record does not reflect that the jury inquired further on the issue. At 3:45 p.m., the jury indicated they had reached a verdict.

b. *Analysis.*

Appellant claims the phrase "zone of risk" is a technical term; therefore, the trial court erred by failing to define it. He argues "a defendant could not be found guilty of the attempted murder of A under the legal definition of the term ['zone of risk'], while he could be found guilty under the ordinary meaning of the term." The premise of his argument is that, under the ordinary meaning of the term, a defendant can be found guilty of the attempted murder of a person in the "zone of risk" absent intent to harm the person.

In *Bland supra*, 28 Cal.4th 313, our Supreme Court stated, "The conclusion that transferred intent does not apply to attempted murder still permits a person who shoots at a group of people to be punished for the actions towards everyone in the group even if that person primarily targeted only one of them. . . . the person might still be guilty of attempted murder of everyone in the group, . . . [¶] The [court in *Ford v. State* (1992) 330 Md. 682 [625 A.2d 984]] explained that . . . the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what it termed the 'kill zone.' *'The intent is concurrent . . . when the*

nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity." (*Bland, supra,* 28 Cal.4th at p. 329.)

After giving examples, *Bland* said, "The defendant has intentionally created a 'kill zone' to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death." (*Bland, supra,* 28 Cal.4th at p. 330, italics added.)

Bland continued, "although the defendant's goal was to kill A, his intent to kill B was also direct; it was concurrent with his intent to kill A. Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone." (*Bland, supra,* 28 Cal.4th at p. 330.)

We reject appellant's argument that "a defendant . . . could be found guilty under the ordinary meaning of the term ['zone of risk']." The term "zone of risk" does not define a crime of which one can be found guilty. The term is only part of an instruction derived directly from *Bland* and pertaining to concurrent intent to kill and the crime of attempted murder. The term "zone of risk" cannot be viewed in isolation but must be construed in light of the whole instruction of which the term is a part. The instruction expressly stated, "A person *who primarily intends to kill one person,* may also *concurrently intend to kill other persons within* a particular zone of risk." The instruction, reasonably understood as a whole, indicates the defendant *intends to kill everyone* in the "zone of risk."

In sum, the term "zone of risk" was not a technical term which the trial court was therefore obligated to define, but was a commonly understood term to be reasonably read in conjunction with the rest of the instruction of which the term was a part, and the instruction, reasonably understood as a whole, precludes a conviction for attempted murder of a person in the "zone of risk" absent intent to harm the person.

Appellant claims that, even if the term "zone of risk" is not a technical term, the trial court erred in violation of Penal Code section 1138,[4] by failing to define the term after the jury requested clarification of it. The claim is unavailing. The record fails to reflect that appellant objected to the trial court's response to the jury's request for clarification. Appellant waived the issue. (*People v. Roldan* (2005) 35 Cal.4th 646, 729.)

Even if the issue was not waived, the trial court did not error. Under Penal Code section 1138, "The court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citations.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citations.] Indeed, comments diverging from the standard are often risky. [Citations.]" (*People* v. *Beardslee* (1991) 53 Cal.3d 68, 97.)

In the present case, the jury apparently needed only to read carefully the term "zone of risk" in the context of CALJIC No. 8.66.1 as a whole. CALJIC No. 8.66.1 was a full and complete instruction. (See *People v. Bland, supra*, 28 Cal.4th at pp. 329-330.) Appellant did not object to the trial court's actions or offer his own clarifying instructions. The court resolved the jury's question by effectively and correctly telling them to reread the entire instruction. The jury posed no further questions on the issue.

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4 Penal Code section 1138, states, "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

The trial court did not err in violation of Penal Code section 1138. (Cf. *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212-1213.)

Finally, appellant argues that whether L.H. was in the zone of risk such as to justify his conviction for her attempted murder was the central issue with respect to count 2, and if the jury properly had been instructed the jury readily could have concluded that appellant did not target Harris by intending to harm L.H. Appellant argument pertains simply to count 2. However, the jury not only convicted appellant on that count, concluding appellant not merely intended to harm, but intended to kill, L.H., but found such intent to kill to be willful, deliberate, and premeditated. The challenged instructional error was harmless. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Appellant, for the first time in his reply brief, argues an instruction "not correct in law" (Rep/4) violates his right to due process, suggests such an instruction violates Penal Code section 1259, and suggests any failure to object to the instruction is ineffective assistance of counsel. He waived the issues by raising them for the first time in his reply brief. (Cf. *People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11; *People v. Thomas* (1995) 38 Cal.App.4th 1331, 1334.)

Moreover, as we previously have indicated, CALJIC No. 8.66.1, including its "zone of risk" language, is a correct statement of the law; therefore, no due process violation occurred. Further, " ' "[g]enerally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." [Citation.]' [Citations.]" (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156.) Appellant requested no such language, accordingly, he waived this issue. No ineffective assistance of counsel occurred because of appellant's counsel's failure to object to the instruction, because it was legally correct.

3. *Imposition of Additional $20 Court Security Fees Is Mandatory.*

At sentencing, the trial court, according to the reporter's transcript, imposed a single $20 court security fee pursuant to Penal Code section 1465.8, subdivision (a)(1).

Respondent claims that since appellant suffered three current convictions, the court should have imposed three court security fees, one for each conviction, and the abstracts of judgment should so reflect. Penal Code section 1465.8, subdivision (a)(1) says, in relevant part, "To ensure and maintain adequate funding for court security, a fee of twenty dollars ($20) shall be imposed on *every conviction* for a criminal offense, . . ." (Italics added.) Respondent is correct. (*People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866.) We will modify the judgment accordingly.

DISPOSITION

The judgment is modified by imposing two additional $20 Penal Code section 1465.8, subdivision (a)(1) court security fees and, as modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment reflecting imposition of a total of three Penal Code section 1465.8, subdivision (a)(1) court security fees.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.